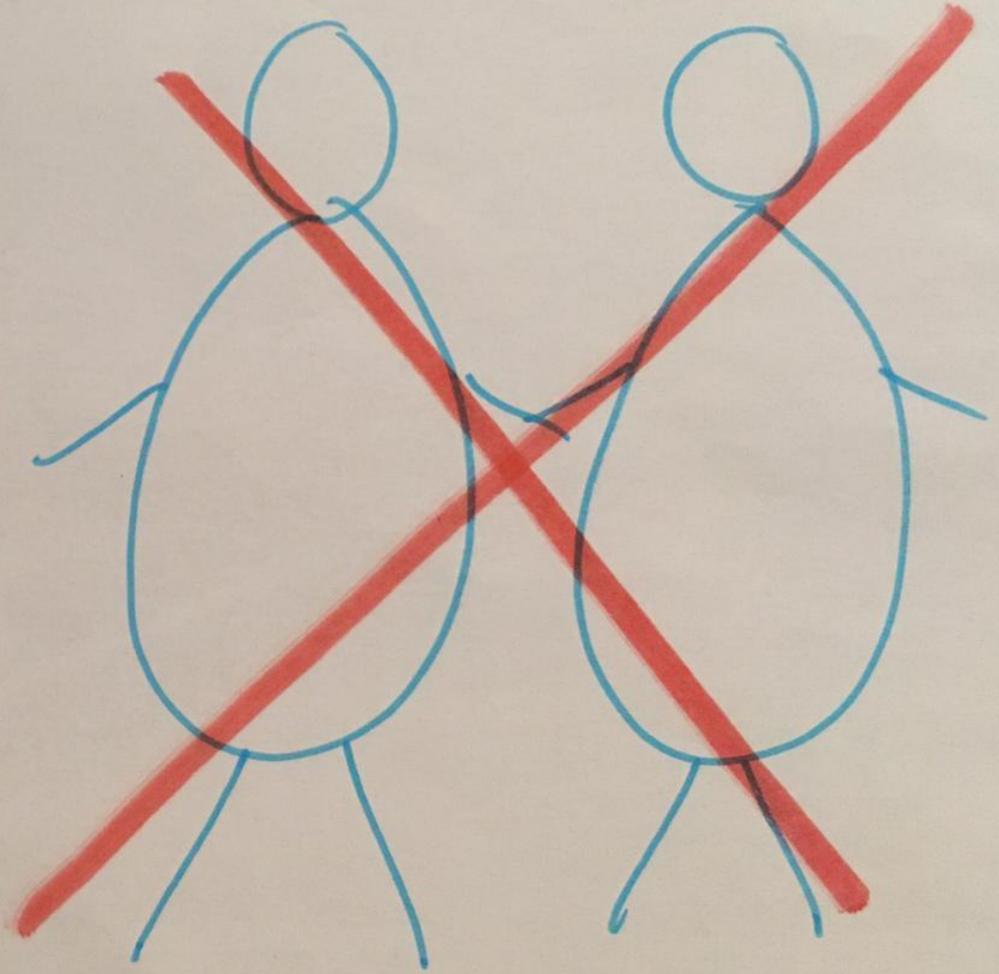
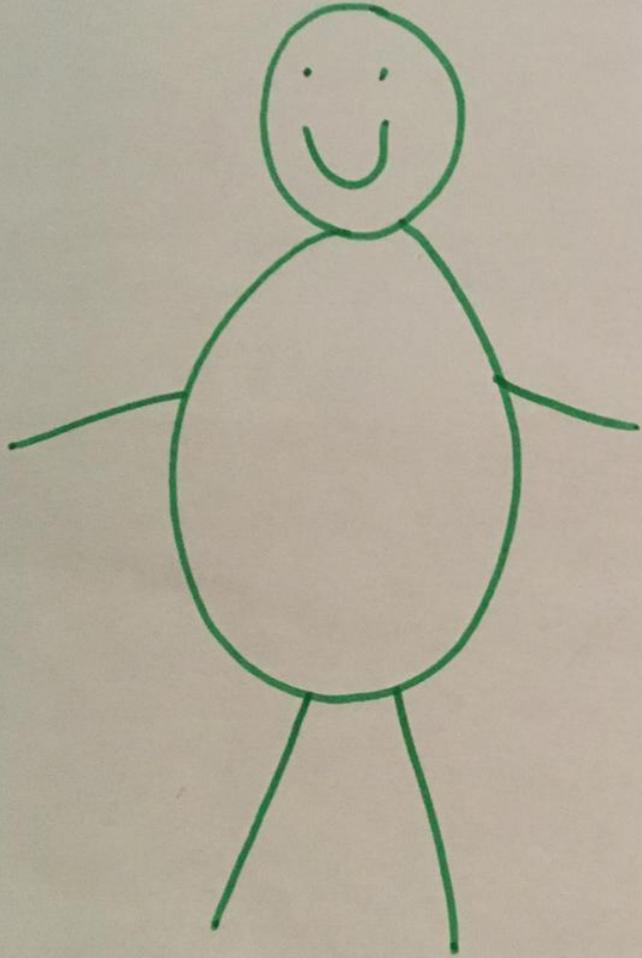
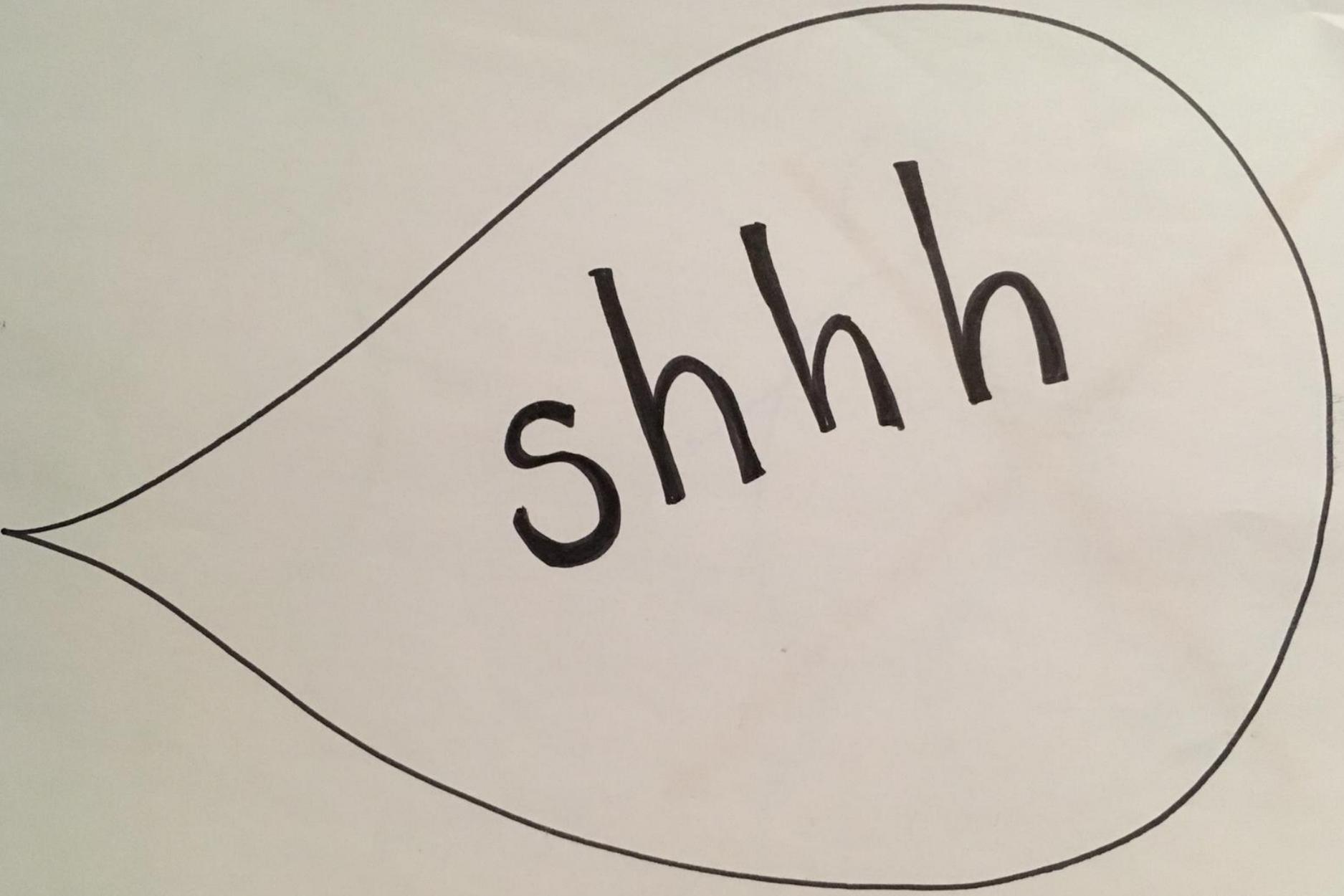


Delay Claims – a practical guide

Lucy Garrett QC

April 2020





shh



Topics covered

1

**How to
prove a
delay claim**

2

**Prevention
and
concurrent
delay**

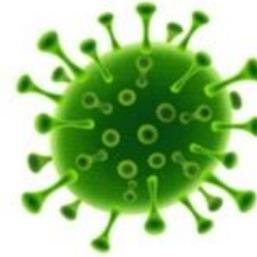
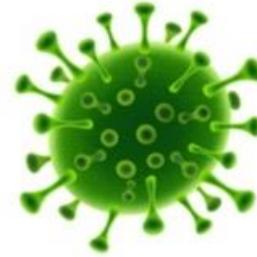
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**Liquidated
Damages –
latest law**



1

**How to
prove a
delay claim**



Typical grounds for extension of time

- Employer instruction
- Weather/ground risk
- Possession of the site
- Suspension of the work due to failure of payment (UK)
- Exercise by govt of statutory power affecting the progress of the works
- Force majeure
- “any impediment, prevention or default” by Employer or similar wording

Key question for all contractual rights/obligations is whether what has happened (whatever the cause) **falls within the contractual grounds for that right/obligation**

COVID-19

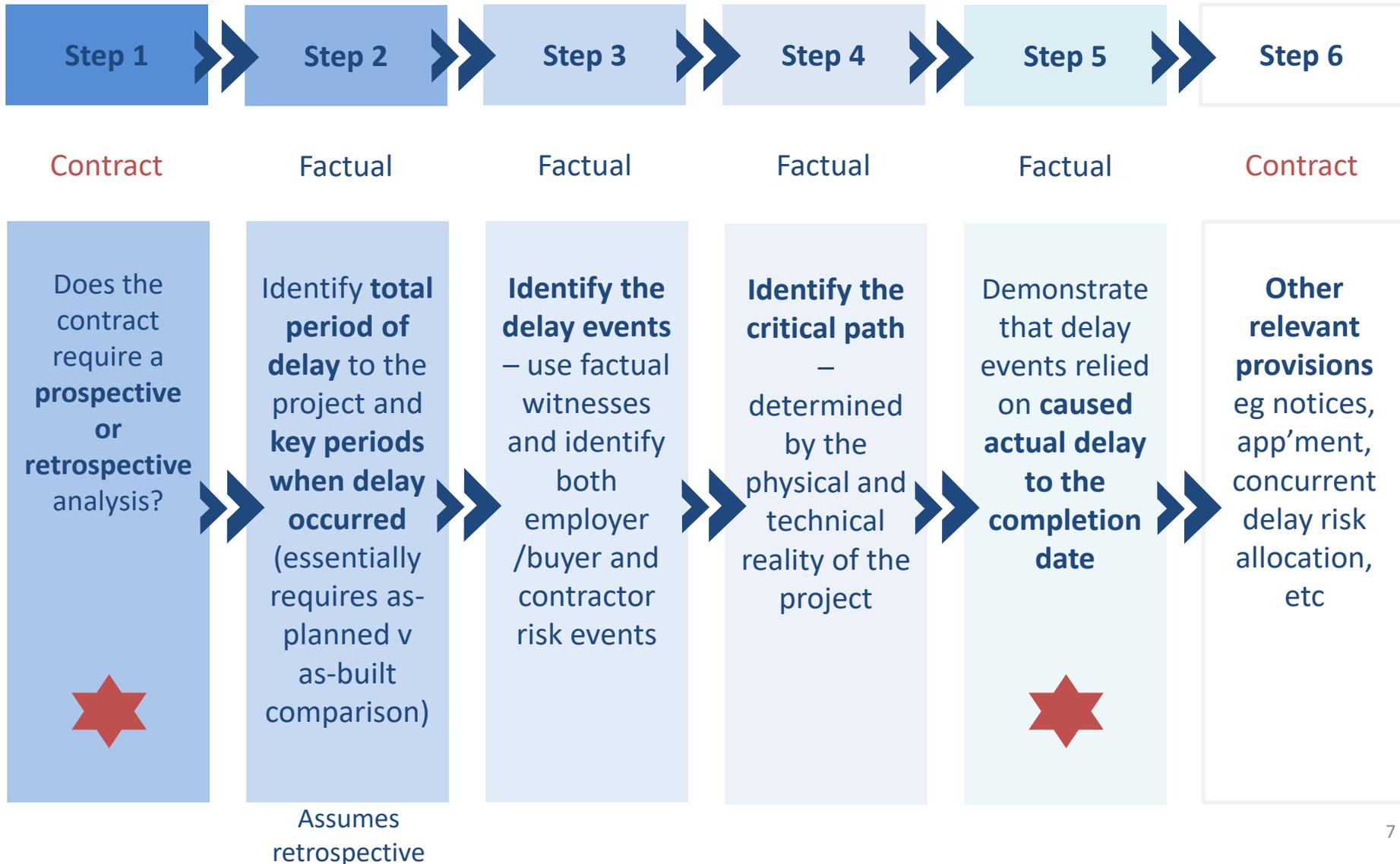
- The Coronavirus Act 2020 passed on 25 March 2020 and is now in force. Section 52 and Schedule 22 confer on the Government the right to close premises during a “public health response period.” Govt has not ordered sites to close; current guidance is construction sites can continue to operate if practising social distancing. Refers to the Construction Leadership Council guidance ([link](#) to Sec of State letter)



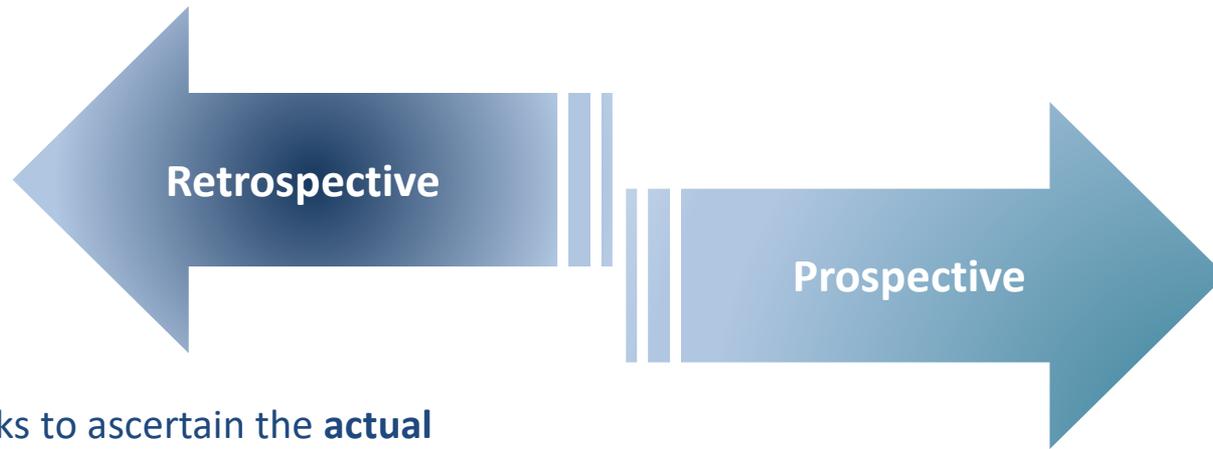
How to prove a delay claim – summary



★ See subsequent slides



The form of analysis is determined by the contract



- Seeks to ascertain the **actual effect of a delay event, based on what in fact happened on the project**
- Can only be carried out once the project is completed, or once the effect of the delay event is past
- If the effect of a delay event is potentially ongoing as at the date of the analysis, then the assessment would be retrospective up to that date, then of necessity prospective
- **Involves detailed factual investigation**
- Seeks to ascertain the **probable future effect of a delay event, as at the time that it occurred**
- If a claim for EOT made **during a project**, contract usually requires and CA will of necessity have to carry out a prospective analysis
- **Often wrong when judged against what actually happened** (always known by the time claim reaches trial)
- **May not suffice** as basis for a claim for **prolongation costs** – traditional causation required under typical clauses (but see NEC)



Or to put it another way...

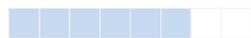


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Authorities on prospective or retrospective



Contract	During project	After completion	Authority	Comment
JCT	Prospective	Retrospective	Walter Lily v Mackay [2012] EWHC 1773 at [380]; <i>Adyard v SDMS</i> [2011] BLR 384 (Comm Ct); Fluor v Shanghai Zenhua HI [2018] EWHC 1 (TCC) at [275]	Authorities surprisingly confused on the specific point. NB that Fluor not an extension of time OR JCT case
FIDIC	Prospective	Retrospective	N/A	No specific reported case on the FIDIC form
SAJ	Probably prospective	Retrospective	<i>Adyard v SDMS</i> [2011] BLR 384 (Comm Ct) at [292]	Decision in <i>Adyard</i> focused on requirement to prove actual delay
NEC	Prospective	Contract appears to require prospective ("forecast" cost and time)	<i>Northern Ireland Housing Executive v Healthy Buildings (Ireland) Ltd</i> [2017] NIQB 43	Irish decision first reported case on approach under NEC3 – decision was that retrospective approach required

Demonstrating that delay events caused actual delay to the completion date

Explanation of how the delay event constrains an activity and the impact of the constraint **proves causation of delay to activity**

Delay event

CONSTRAINS

A specific work activity

which suffers specific **IMPACT**

Constraint is either:

- Physical
- Resource
- Contractor's preference

IMPACT that activity suffers:

- Delayed start
- Prolonged duration
- Both

Repeating the process through chain of activities to completion date **proves causation of critical delay**

Which **CONSTRAINS** next specific activity, which suffers specific **IMPACT**

All activities **must be on the critical path**

Continue until completion



1

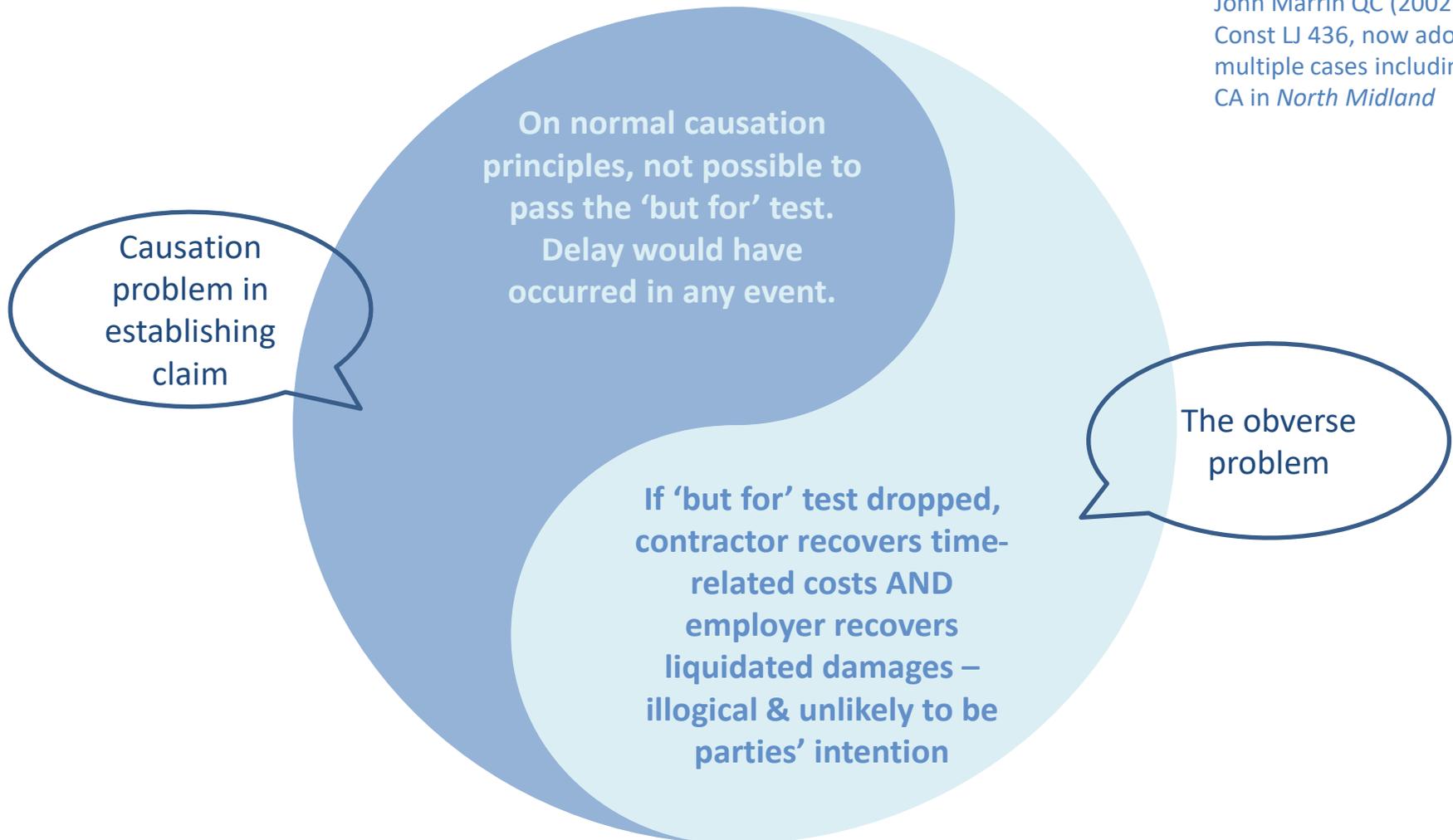
**How to
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**Prevention
and
concurrent
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“A period of project overrun which is caused by two or more effective causes of delay of approximately equal causative potency”

John Marrin QC (2002) 18(6)
Const LJ 436, now adopted in
multiple cases including by the
CA in *North Midland*



Concurrent delay – time claims, prevention principle & express drafting

Time claims under the contract (for extension of time)



UK: Contractor recovers extension of time but no time-related cost: *Henry Boot v Malmaison (1999) 70 ConLR 33*



Applied in:

- *Royal Brompton v Hammond (No.7) EWCA Civ 296; 76 ConLR 148*
- *Adyard v SDMS [2011] BLR 384 (Comm)*
- *De Beers v Atos [2010] EWHC 3276*
- *Walter Lilly v Mackay [2012]*
- *Saga Cruises v Fincantieri SpA [2016] EWHC 1875 (Comm)*

Defence to liquidated damages claim based on prevention principle ★



Contractor can recover neither time nor money as act of prevention must cause (on 'but for' basis) actual delay [?]



Held in:

- *Adyard v SDMS [2011] BLR 384 (Comm)*
- *Jerram Falkus Construction Limited v Fenice Investments Incorporated (No. 4) [2011] EWHC 1935 (TCC)*
- **Not discussed in *North Midland v Cyden [2018] EWCA Civ 1744***

It is lawful to contract out of the prevention principle by providing expressly for the consequence of concurrent delay: ***North Midland in the CA***

★ Must be no applicable EOT clause

Effect of act of prevention on liquidated damages (English law)

Long established principle of law: **where one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default:** *Holme v Guppy* (1838) and *Dodd v Churton* [1897]

BUT

No reference to “time at large” or to complete loss of all right to liquidated damages

Peak v McKinney (1970) 1 BLR 11, CA – three judgments:

Salmon LJ:

“The liquidated damages clause contemplates a failure to complete on time due to the fault of the contractor... **If the failure to complete on time is due to the fault of both the employer and the contractor, in my view, the clause does not bite... the employer, in the circumstance postulated, is left to his ordinary remedy;** that is to say, to recover such damages as he can prove flow from the contractor’s breach.”



Edmund-Davies LJ:

Since the stipulated time for completion had ceased and the extension of time clause had no application, “it seems to follow that there is in such a case **no date from which liquidated damages could run and the right to recover them has gone.**”

Phillimore LJ:

The liquidated damages clause had become “**unworkable**, if only because there is **no fixed date** from which to calculate that for which the contractor is responsible and for which he must pay liquidated damages...” However, he stated he was “**somewhat startled**” at the proposition that “**the moment any part of the delay which has occurred can be attributed to the employer, then any agreement as to liquidated damages disappears.**”





2 strands of authorities but *Multiplex* the orthodoxy



McAlpine Humberoak v McDermott
(1992) 58 BLR 1 & others



Multiplex v Honeywell (No.2) [2007]
EWHC 447 (TCC)

Jackson J (as he then was):

“(i) Actions by the employer which are perfectly legitimate under a construction contract may still be characterised as prevention, if those actions cause the delay beyond the contractual completion date.

(ii) Acts of prevention by an employer do not set time at large, if the contract provides for an extension of time in respect of those events.

(iii) Insofar as the extension of time clause is ambiguous, it should be construed in favour of the contractor...”



Trollope & Colls v Northwest Metro Regional Hospital Board [1973] 1 WLR 601, HL

Lord Pearson:

Referred to **2 propositions put forward by the CA as derived from *Dodd v Churton***:

- (1) It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if one party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time.

- (2) **The time becomes at large. The work must be done within a reasonable time...**

Lord Pearson approved proposition 1 but said that *Dodd v Churton* did not establish “or afford any support to” proposition 2.



Sir Vivian Ramsey in his SCL lecture “Prevention, Liquidated Damages and Time At Large” (3 April 2012) pointing out that current orthodoxy based on *Peak* and no good explanation given in that case.

Keating on Offshore Engineering (2nd Ed)
Puts forward the argument discussed in these slides

Coulson LJ in his SCL lecture “Prevention or cure? Delay claims and the rise of concurrency clauses” (June 2019) agreeing with Sir Vivian and referring to “potentially draconian consequences of this relatively recent development of the prevention principle.”

But what should the law be?

All three suggest or indicate (by reference to *Rapid Building Group v Ealing* [1984] 29 BLR 5, CA):

- Contractual completion date replaced by a date determined by the reasonable time for completion (requiring identification of the additional time required as a result of the employer’s act of prevention)
- Liquidated damages recoverable for the period of delay caused by the contractor, and not recoverable for the period of delay caused by the act of prevention - **legal basis for this implied term?**



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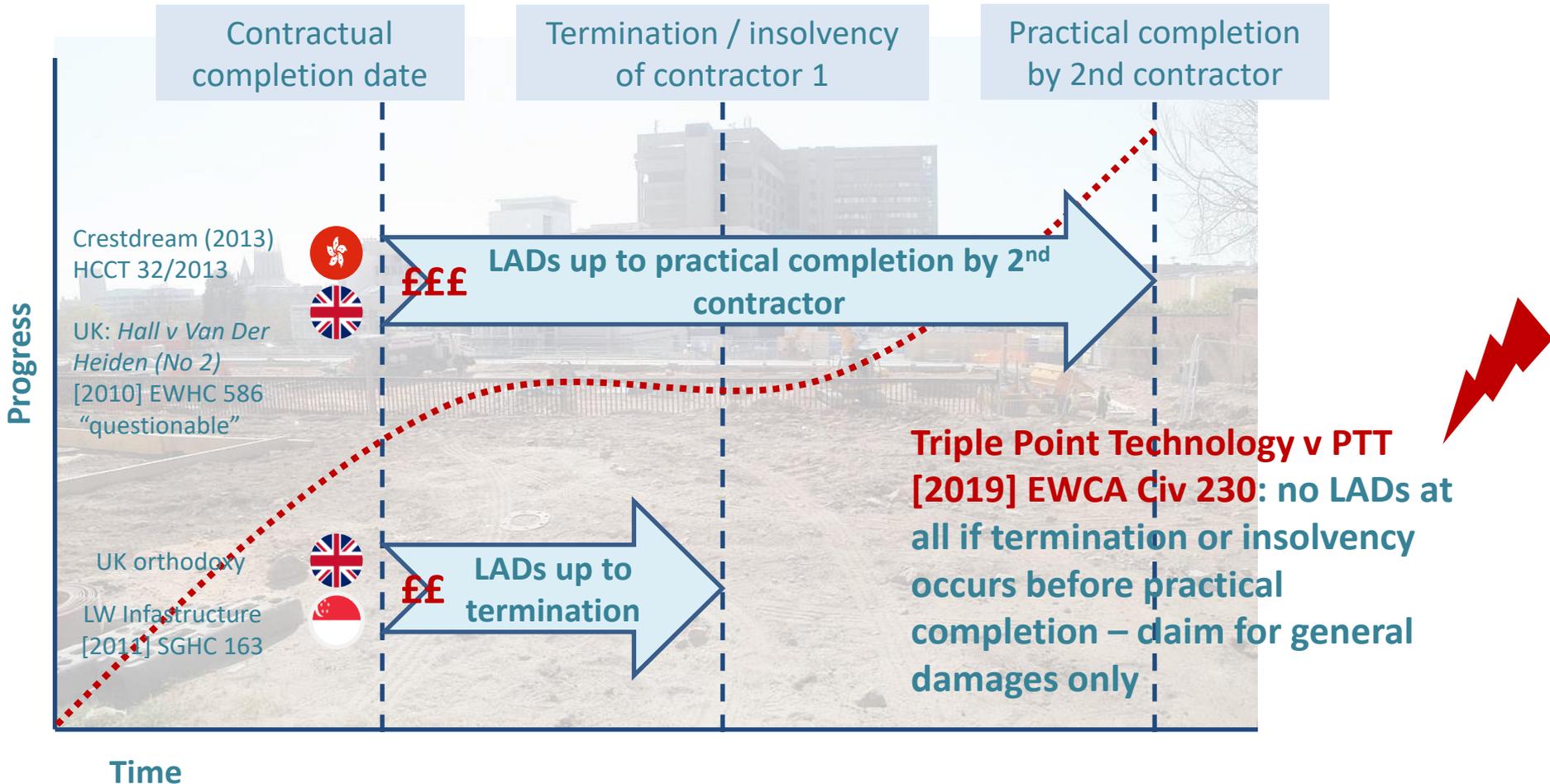
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**Liquidated
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Recovery of liquidated damages on termination prior to practical completion

General principle: rights accrued prior to termination survive the termination



THANK YOU

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